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Overruled by State v. Johnson, | Wis., | May 16, 2023

Original Image of 499 N.W.2d 719 (PDF)

State v. Shiffra

Court of Appeals of Wisconsin. March 31, 1993 | 175 Wis.2d 600 | 499 N.W.2d 719 *(Approx. 10 pages)*

STATE of Wisconsin, Plaintiff–Appellant,

v.

Shaun A. SHIFFRA, Defendant–Respondent.

No. 92–1986–CR
Submitted on Briefs Jan. 26, 1993.
Opinion Released March 31, 1993.
Opinion Filed March 31, 1993.

Synopsis

Defendant was charged with sexual assault. The Circuit Court, Kenosha County, Michael S. Fisher, J., issued pretrial order suppressing testimony of victim because she refused to allow in camera inspection of her mental health treatment records, and state appealed. The Court of Appeals, Brown, J., held that: (1) defendant made preliminary showing of materiality so as to entitle him to pretrial in camera inspection of victim's records, and (2) suppression of victim's testimony was appropriate sanction for her refusal to submit records to in camera inspection.

Affirmed.

West Headnotes (12)

Change View

1 **Criminal Law** Review De Novo
Court of Appeals reviews constitutional questions de novo, without deference to trial court.

2 Cases that cite this headnote

2 **Constitutional Law** Rights to notice, hearing, and defense, in general
Under due process clause, defendants must be given meaningful opportunity to present complete defense. U.S.C.A. Const.Amends. 5, 14.

4 Cases that cite this headnote

3 **Criminal Law** Particular documents or tangible objects
Defendant's right to discover exculpatory evidence does not include authority to search state's entire file.

4 **Criminal Law** Examination by court; inspection in camera
In camera review of evidence achieves proper balance between defendant's rights and state's interests in protection of its citizens.

2 Cases that cite this headnote

SELECTED TOPICS

Criminal Law

Trial
Duty of Discovery and Disclosure of Defendant Prior Criminal Record
Appeals Reviews De Novo Question of the Construction and Applicability of Federal Statute

Privileged Communications and Confidentiality

In Camera Review
In Camera Inspection of Psychiatric or Special Education Records

Secondary Sources

§ 19:18. Probationers and parolees
9 Wis. Prac., Criminal Practice & Procedure § 19:18 (2d ed.)

...The Wisconsin courts have long recognized that parolees and probationers, while they have greater privacy interests than prisoners, do not enjoy the same degree of privacy expectations as the ordinary ...

§ 11.7(c). Standards of appellate review
6 Search & Seizure § 11.7(c) (6th ed.)

...If a criminal case involving a disputed Fourth Amendment issue reaches the appellate court, the very first question that court ought to decide is exactly what standard or standards are to be utilized i...

§ 511.2. The Shiffra/Green procedures: Production of a witness's privileged health care records
7 Wis. Prac., Wis. Evidence § 511.2 (4th ed.)

...The Wisconsin Supreme Court has recently overruled the Shiffra/Green line of cases on grounds that it has proved to be "unsound," "unworkable," and "undermined" by "new" protections for victims. State ...

See More Secondary Sources

Briefs

Brief for the United States in Opposition
2023 WL 8315866
John CANADA, Petitioner, v. UNITED STATES OF AMERICA.
Supreme Court of the United States
Nov. 29, 2023

...[Note: Page II missing in original document] The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 76 F.4th 1304. The order of the district court (Pet. App. 21a-29a) is not published in...

Brief for Respondent
1986 WL 728021
COMMONWEALTH OF PENNSYLVANIA, Petitioner, v. George F. RITCHIE, Respondent.
Supreme Court of the United States
Sep. 04, 1986

...FN* Counsel of Record No federal jurisdictional basis exists to review the December 11, 1985 decision of the Supreme Court of Pennsylvania, Commonwealth v. Ritchie, 509 Pa. 357, 502 A.2d 148 (1985), on...

Reply Brief for Petitioner
2023 WL 8690882
John CANADA, Petitioner, v. UNITED STATES OF AMERICA, Respondent.

5 **Criminal Law** Examination by court; inspection in camera
To be entitled to in camera inspection, defendant must make preliminary showing that sought after evidence is material to her defense.

18 Cases that cite this headnote

6 **Criminal Law** Questions of Fact and Findings
Court of Appeals reviews, under clearly erroneous standard, findings of fact made by trial court in its determination of materiality of evidence for purposes of granting in camera inspection.

4 Cases that cite this headnote

7 **Privileged Communications and Confidentiality** In camera review
Statute allowing for confidentiality of evidence is not barrier to in camera review.

6 Cases that cite this headnote

8 **Privileged Communications and Confidentiality** Mental health records
Privileged Communications and Confidentiality In camera review
Fact that sexual assault victim's past mental health treatment records were temporally remote from alleged incident for which defendant was charged did not mean that in camera inspection was unwarranted; temporal element would come into effect when trial court conducted its in camera inspection and if records were too remote in time or were inconsistent with victim's current condition, they would not be relevant or material and, accordingly, should not be turned over to defense.

35 Cases that cite this headnote

9 **Criminal Law** Examination by court; inspection in camera
Defendant must make preliminary showing that sought after evidence is relevant and may be helpful to defense or that it is necessary to fair determination of guilt or innocence so as to be entitled to pretrial in camera inspection of evidence.

34 Cases that cite this headnote

10 **Criminal Law** Proceedings for Disclosure
Initial burden of showing that informant may be able to give testimony necessary to fair trial is minimal and if it is met, further inquiry by trial court is required.

11 **Criminal Law** Examination by court; inspection in camera
Privileged Communications and Confidentiality Mental health records
Defendant made preliminary showing of materiality so as to entitle him to pretrial in camera inspection of sexual assault victim's mental health treatment records; victim's psychiatric difficulties might affect both her ability to accurately perceive events and her ability to relate the truth and these difficulties were relevant because they directly affected victim's credibility and bore directly on defendant's defense of consent and although evidence contained in victim's psychiatric records might yield no information different from that available elsewhere, probability was equally as great that records contained independently probative information.

47 Cases that cite this headnote

Supreme Court of the United States
Nov. 12, 2023

...The contradictory arguments and omissions in the Brief in Opposition only underscore the need for this Court to resolve an entrenched circuit conflict and enforce adherence to its holding in Ornelas v....

See More Briefs

Trial Court Documents

Friends of Stower v. Polk County
2023 WL 11828735
FRIENDS OF STOWER Seven Lakes State Trail, Inc., James Judkins, and Denise Kaye, Plaintiffs, v. POLK COUNTY, and Polk County Board of Supervisors, Defendants.
Circuit Court of Wisconsin.
July 26, 2023

...This is a common law certiorari action in which the Plaintiffs are seeking a review and reversal of a decision of Polk County/Polk County Board of Supervisors approving a Master Plan for the Stower Sev...

State v. Evans
2002 WL 34395611
State of Wisconsin, Plaintiff, v. Iran D. EVANS, Defendant.
Circuit Court of Wisconsin.
May 29, 2002

...On May 10, 2002, the defendant by his attorney filed a motion for postconviction relief pursuant to section 809.30, Stats., seeking a new trial. A jury convicted the defendant of attempted first degree...

Milwaukee Police Ass'n v. City of Milwaukee
2014 WL 786742
MILWAUKEE POLICE ASSOCIATION, et al., Plaintiffs, v. CITY OF MILWAUKEE, Defendant. Milwaukee Professional Fire Fighters Association Local 215, Intervenor-Plaintiff, v. City of Milwaukee, Defendant.
Circuit Court of Wisconsin.
Jan. 27, 2014

...This case is before the Court on cross-motions for summary judgment. The parties seek a declaratory judgment from this Court determining whether the City of Milwaukee ("City") may continue to enforce i...

See More Trial Court Documents

12 **Criminal Law** Failure to produce information

Trial court's suppression of sexual assault victim's testimony was appropriate sanction for victim's refusal to submit her mental health treatment records to in camera review; no other sanction was appropriate since court did not have authority to hold victim in contempt because she was not obligated to disclose her psychiatric records, adjournment would be of no benefit because sought after evidence would still be unavailable and allowing victim to testify, despite her continuing assertion of confidentiality privilege, but also allowing defendant to tell jury that victim refused to allow access to her records was no solution since jury might well consider victim's decision to be reasonable exercise of her right to privacy, rather than attempt to hide something material to credibility of her testimony.

32 Cases that cite this headnote

Attorneys and Law Firms

***720 *602** On behalf of the plaintiff-appellant, the cause was submitted on the briefs of James E. Doyle, Atty. Gen., and Marguerite M. Moeller, Asst. Atty. Gen.

On behalf of the defendant-respondent, the cause was submitted on the brief of Jon G. Mason of Jon G. Mason, S.C. of Kenosha.

Before NETTESHEIM, P.J., and BROWN and ANDERSON, JJ.

Opinion

BROWN, Judge.

The state appeals from a pretrial order suppressing the testimony of the victim of an alleged sexual assault. The trial court suppressed the testimony because the victim refused to allow an *in camera* inspection of her past mental health treatment records. The first issue is whether an *in camera* inspection is warranted under *Pennsylvania v. Ritchie,* 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). The second issue is whether preclusion of the alleged victim's testimony at trial is the proper sanction for her refusal to submit the records to an *in camera* review. We affirm.

On July 28, 1991, Shaun A. Shiffra encountered Pamela P. at a bar. After having a drink, the two left the bar to go to Shiffra's apartment. They planned to get a meal gift certificate and then proceed to a restaurant for dinner with another couple. The alleged sexual assault occurred while Pamela was looking at some shirts in Shiffra's bedroom. After the incident, Pamela had bruises on her breasts and left elbow and a “hickey” on her left breast. She reported the incident and made a statement to the police on the same evening.

On August 9, Shiffra was charged with second-degree sexual assault contrary to sec. 940.225(2)(a), Stats. Based on Pamela's testimony at the preliminary hearing, the court bound Shiffra over for trial. He subsequently ***603** pled not guilty. One day before trial, defense counsel moved for an adjournment based on evidence recently disclosed by the state. The motion stated in pertinent part, that “the State ha[d] provided the defendant with information which indicate[d] that ... the complaining witness has a history of psychiatric problems which may affect her ability to perceive and relate truthful information.” The trial court granted the adjournment.

The order that is the subject of this appeal arose when defense counsel moved “for an order requiring the plaintiff and complainant, Pamela [P.], to reveal to the defendant her psychiatric history, psychiatric records and to execute an authorization to release medical information from any doctors, hospitals or counselors seen by Pamela [P.] with respect to her mental condition.” Shiffra argued that “he should not be bound by [Pamela's] own self-reporting of the effects of her psychiatric disorders on her ability to perceive and relate truthful testimony.”

At the hearing on the motion to compel, defense counsel stated that Shiffra viewed his contact with Pamela to be consensual at the time of the incident. After argument, ***721** counsel said that he would not have any objection to an *in camera* review of the records. He stated:

> I do not want anything from this woman's history other than evidence that she may suffer from some type of psychiatric disorder which causes her an inability to truthfully relate facts as she perceives them.... And that she may suffer from an inability or some disorder which causes her to have flashbacks to previous instances in her life and then they become sexual assaults of her because of her disorders.

***604** The state opposed the motion on the grounds that the physical evidence corroborated Pamela's story and that her records were absolutely privileged under sec. 905.04, Stats. The state also suggested that defense counsel was on a "fishing expedition" because Shiffra had not yet articulated his theory of defense. Defense counsel responded by acknowledging Pamela's privilege and requesting that the court bar her testimony if she refused to disclose her psychiatric records. He also reiterated the defense theory that the sexual contact was consensual.

After hearing the arguments, the court stated, "[T]here has been provided to the Court, I think, an adequate showing to indicate that there may be psychological problems which do affect—or psychiatric which do affect the individual's ability to accurately perceive what is going on about here [*sic*]." The court continued:

> I think there has been a sufficient basis shown—provided to the Court for the Court to at least believe an *in camera* inspection be ordered for the Court to determine whether or not there is anything in the ... psychiatric or psychological reports which would be of materiality to the defendant, Mr. Shiffra.

The hearing was adjourned to give Pamela a chance to decide whether she would waive her sec. 905.04, Stats., privilege.

Pamela decided not to allow the court access to her records for an *in camera* review. Shiffra then brought a motion to bar Pamela's testimony. In its decision, the court acknowledged that it did not have the power to order the records' release. The court gave Pamela twenty-one days to disclose her records. When she failed ***605** to do so, the court issued an order barring Pamela from testifying at trial. The state now appeals.

1 We must first decide whether Shiffra is entitled to an *in camera* review of Pamela's past psychiatric and mental health treatment records. This question implicates Shiffra's constitutional right to due process of law. [1] *See Ritchie,* 480 U.S. at 56, 107 S.Ct. at 1000. We review constitutional questions *de novo,* without deference to the trial court. *State v. Littrup,* 164 Wis.2d 120, 126, 473 N.W.2d 164, 166 (Ct.App.1991).

2 3 4 Under the due process clause, criminal defendants must be given a meaningful opportunity to present a complete defense. *California v. Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984). A defendant's right to discover exculpatory evidence does not include the authority to search the state's entire file. *Ritchie,* 480 U.S. at 59, 107 S.Ct. at 1002. Rather, an *in camera* review of evidence achieves the proper balance between the defendant's rights and the state's interests in protection of its citizens. *See id.* at 60–61, 107 S.Ct. at 1002–1003.

5 6 To be entitled to an *in camera* inspection, the defendant must make a preliminary showing that the sought-after evidence is material to his or her defense. *State v. S.H.,* 159 Wis.2d 730, 738, 465 N.W.2d 238, 241 (Ct.App.1990); *In re K.K.C.,* 143 Wis.2d 508, 511, 422 N.W.2d 142, 144 (Ct.App.1988). We review under the clearly erroneous standard the findings of fact made by the trial court in its materiality determination. *See* ***606** *State v. Turner,* 136 Wis.2d 333, 343–44, 401 N.W.2d 827, 832 (1987).

****722** Both Shiffra and the state agree that *Ritchie* is the proper starting point for our analysis. However, the parties differ in their interpretations of that case. The state distinguishes *Ritchie* on the following four grounds. First, the state argues that this case "does not fall within the ambit of *Ritchie* " because Pamela's records are not in the possession of the prosecution or any other state agency. Second, there is no "direct nexus"

between the records and the charge against Shiffra because many of the records are temporally remote from the incident at issue here. Third, the records in this case are absolutely protected from disclosure by statute,[2] whereas the *Ritchie* case involved a statute that allowed disclosure in certain circumstances. Finally, this case involves a pretrial determination of materiality; *Ritchie* was an appeal following the defendant's trial and conviction. Therefore, the principles enunciated in *Ritchie* do not apply to this case.

The state's first three arguments are easily disposed of. We are bound by Wisconsin precedent, which clearly makes *Ritchie* applicable to cases in which the information sought by the defense is protected by statute and is ***607** not in the possession of the state. *See K.K.C.,* 143 Wis.2d at 511, 422 N.W.2d at 144 (information sought was confidential); *S.H.,* 159 Wis.2d at 736, 465 N.W.2d at 240–41 (information sought was protected under sec. 905.04, Stats., and was in the possession of a private counseling center). According to these cases, Shiffra is entitled to an *in camera* inspection if he meets the burden of making a preliminary showing of materiality.

7 The state contends that *S.H.* and *K.K.C.* are not binding because their relevant language is *dicta.* We do not agree. Both cases unequivocally adopted *Ritchie* as the law in Wisconsin even when the records are not in the state's possession. This precedent also suggests that whether the records are temporally remote is not a condition precedent which must be decided prior to *in camera* inspection—only a preliminary showing of materiality is needed. Finally, a statute allowing for confidentiality is not a barrier to *in camera* review. We are bound by those determinations.

8 Furthermore, the fact that some of Pamela's records are temporally remote from the incident for which Shiffra was charged does not meaningfully distinguish this case from *Ritchie.* The temporal element will come into effect when the trial court conducts its *in camera* inspection; if the records are too remote in time or are inconsistent with her *current* condition, they will not be relevant or material and should not be turned over to the defense.

We now address the state's argument that the principles enunciated in *Ritchie* are inapplicable to a pretrial proceeding. We appreciate the state's argument that materiality is difficult to determine before trial because the record is not fully developed. However, the standard of materiality urged by the state is inappropriate in the case of a pretrial motion to compel discovery.

***608** The state's standard would make evidence material only if the information probably would change the outcome of the defendant's trial. This standard is impossible to meet pretrial. If we were to apply this standard, we would be ignoring the language in *K.K.C.* and *S.H.,* which entitles defendants to *in camera* inspection of evidence. This we decline to do because we conclude that the "preliminary showing" described in *S.H.* creates a more realistic burden on the defendant than the one urged by the state.

9 ***723** We conclude that the defendant's burden should be to make a preliminary showing that the sought-after evidence is relevant and may be helpful to the defense or is necessary to a fair determination of guilt or innocence. In crafting this rule, we analogize to cases in which a defendant seeks disclosure of a government informant's identity. The seminal case on this issue is *Roviaro v. United States,* 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).

In *Roviaro,* the defendant sold heroin to a government informant. Roviaro was subsequently tried and convicted of knowingly receiving and transporting heroin. Prior to and during trial, the defense sought to learn the identity of the government informant. Those requests were denied. The court of appeals upheld the conviction, but the Supreme Court reversed.

The Supreme Court held that Roviaro had a right to know the identity of the government's informant. The Court reasoned that "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege [to withhold the identity of an informant] must give way." *Id.* at 60–61, 77 S.Ct. at 627–628. The Court also stated, "The problem is one that calls for balancing the public interest ***609** in protecting the flow of information against the individual's right to prepare his defense." *Id.* at 62, 77 S.Ct. at 628–629.

10 The balancing philosophy from *Roviaro* is reflected in sec. 905.10, Stats.,[3] which is also grounded in Wisconsin case law precedent. *State v. Outlaw,* 108 Wis.2d 112, 121, 124, 321 N.W.2d 145, 151, 152 (1982). The initial burden of showing that the informant may be able to give testimony necessary to a fair trial is minimal; if it is met, further inquiry by the trial court is required. *State v. Hargrove,* 159 Wis.2d 69, 75, 464 N.W.2d 14, 17, *published as corrected,* 469 N.W.2d 181, 184 (Ct.App.1990).

We recognize that the informant cases differ from the present case because they involve a statute authorizing *in camera* review. However, this difference is not fatal to our analogy. Section 905.10, Stats., is based on case law precedent that set forth balancing considerations similar to those in this case. Both situations require us to balance the defendant's constitutional right to a fair trial against the state's interest in protecting its citizens by upholding a statutorily created privilege. ***610** Both situations also address a pretrial showing that sought-after evidence or testimony is material to the defense.

11 In this case, Shiffra's preliminary showing of materiality must establish that Pamela's records are relevant and may be necessary to a fair determination of guilt or innocence. The state contends that the evidence Shiffra seeks is merely cumulative of other evidence already available to him. The state points to defense knowledge, from interviewing Pamela, that she has been diagnosed with post-traumatic stress disorder related to suffering repeated sexual assaults by her stepfather. The state also points out defense knowledge that Pamela has been treated for various psychiatric problems since the age of six and that she has been hospitalized several times for undiagnosed psychiatric disorders. The state further observes that Pamela admitted to problems with chemical ***724** abuse and told the defense that she takes multiple prescribed medications.

Pamela also told the defense about an incident with her former employer in which she was terminated because she said to her boss, “You're mad because I won't fuck you.” In addition, the defense was aware of a previous incident in which Pamela had filed sexual assault charges that were later reduced to disorderly conduct. In that case, Pamela's sister refused to testify on her behalf, in part because the sister felt Pamela was “unable to distinguish between what had occurred and what would be characterized as some dream effect.” A search of criminal records also disclosed that Pamela had been charged with endangering safety by conduct regardless of life by firing a revolver through a car window at her former boyfriend. She claimed that she was trying to get his attention by firing the revolver. The state's position is that the trial court acted prematurely in finding a ***611** preliminary showing of materiality because the defendant has available to him other sources of information which potentially could yield precisely the same type of information he claims might be contained in Pamela's records.

We disagree with the state. It may well be that the evidence contained in the psychiatric records will yield no information different from that available elsewhere. However, the probability is equally as great that the records contain independently probative information. It is also quite probable that the *quality* and probative *value* of the information in the reports may be better than anything that can be gleaned from other sources. Finally, the information might well serve as a *confirmation* of Pamela's reality problems in sexual matters. It is the duty of the trial court to determine whether the records have any independent probative value after an *in camera* inspection of the records.

We believe that the state's position shows too little confidence in the role of the trial court in balancing a person's right to confidentiality of mental health records against the defendant's right to present a defense. That lack of confidence is unfounded. A judge's duties were aptly described nearly two centuries ago in the landmark case of *Marbury v. Madison,* 5 U.S. (1 Cranch.) 137, 2 L.Ed. 60 (1803). There, Justice John Marshall stated, “If two laws conflict with each other, the courts must decide on the operation of each.... This is of the very essence of judicial duty.” *Id.* at 177–78.

Judges were bound to balance difficult conflicts at the time of *Marbury,* and they are bound to do so now. If we ignored the mandate of *Ritchie* and deny Shiffra's request for *in camera* inspection, we would be disregarding the best tool for resolving conflicts between the sometimes competing goals of confidential privilege and ***612** the right to put on a defense. Public policy and the history of our judicial system require that Wisconsin's courts embrace *Ritchie* in the manner prescribed by our court in *K.K.C.* and *S.H.*.

We conclude that Shiffra has met the burden of making a preliminary showing of materiality. He presented ample evidence during the hearing on his discovery motion that Pamela's psychiatric difficulties might affect both her ability to accurately perceive events and her ability to relate the truth. These difficulties are relevant because they directly affect Pamela's credibility. They also bear directly on Shiffra's defense of consent. Shiffra is entitled to an *in camera* inspection of the records.

12 The only issue remaining is whether the trial court misused its discretion when it suppressed Pamela's testimony as a sanction for her refusal to release the records. In this situation, no other sanction would be appropriate. The court did not have the authority to hold Pamela in contempt because she is not obligated to disclose her psychiatric records. An adjournment in this case would be of no benefit because the sought-after evidence would still be unavailable. Under the circumstances, *****725*** the only method of protecting Shiffra's right to a fair trial was to suppress Pamela's testimony if she refused to disclose her records. We affirm the trial court's order. [4]

****613*** Order affirmed.

All Citations

175 Wis.2d 600, 499 N.W.2d 719

Footnotes

1 Both parties presented arguments in their briefs regarding Shiffra's rights to confrontation and compulsory process. Because we decide this case based on a due process analysis, we do not address the confrontation and compulsory process issues raised by the parties.

2 The state points to sec. 905.04(2), Stats., which states in relevant part:

> GENERAL RULE OF PRIVILEGE. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's ... mental or emotional condition, among the patient, the patient's physician, ... the patient's psychologist, the patient's social worker, the patient's marriage and family therapist, the patient's professional counselor or persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician, ... psychologist, social worker, marriage and family therapist or professional counselor.

3 Section 905.10, Stats., states in relevant part:

> **Identity of informer.** (1) RULE OF PRIVILEGE. The federal government of a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer....
>
> ....
>
> (3) EXCEPTIONS.
>
> ....
>
> (b) *Testimony on merits.* If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case ... and ... a state ... invokes the privilege, the judge shall give the ... state ... an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony.

4 The state suggests that one solution would be to allow Pamela to testify despite her continuing assertion of her confidentiality privilege, but to allow the defendant to tell the jury that she has refused to allow access to her records. We hold that this is no solution at all. The jury will know only that the

witness has exercised her privilege not to divulge her personal mental history. A reasonable juror might well consider this decision to be a reasonable exercise of her right to privacy rather than an attempt to hide something material to the credibility of her testimony. While the state terms the allowing of a comment by the defense to be a “sanction against” the complaining witness, it is reasonable to believe that the jury will instead consider the witness' choice with favor. The state's suggestion has no merit.

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